IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KILEO, J.A.,ORIYO ,J.A. And KAIJAGE,J.A.)

CRIMINAL APPEAL NO. 68 OF 2010

PATRICK MICHAEL @ UROMI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania At Arusha)

(Sambo, J.)

Dated the 28th day of February, 2010
in
Criminal Appeal No. 28 of 2009

JUDGMENT OF THE COURT

4th June & 8th June, 2013

ORIYO, J. A.:

The appellant and one Richard Ismail @ Mollel were charged in the District Court of Arusha at Arusha with two counts of Armed Robbery contrary to section 287A of the Penal Code. The appellant was also charged with two other counts of unnatural offence contrary to section 154 (1) (a) and Rape contrary to sections 130(1) (2) (b) and 131(1) of the Penal Code, Cap 16, R.E 2002. Both accused pleaded not guilty on all counts. However, before the trial began, at the request of the prosecution, the trial Court ordered the withdrawal from prosecution, Richard Ismail @ Mollel in terms of section 98 (a) of the Criminal Procedure Act, Cap 20, R.E. 2002. The

second accused was accordingly discharged and the trial against the appellant proceeded.

The appellant was subsequently acquitted on the first and second counts of Armed Robbery in the absence of evidence from the prosecution witnesses. For the third and fourth counts of unnatural offence and rape, he was convicted as charged and sentenced to thirty years imprisonment for each count. The sentences were ordered to run concurrently. He unsuccessfully appealed to the High Court, hence this appeal.

His appeal to this Court has five (5) grounds of complaint. However the complaints revolve around the following issues. The **first** issue is on the question of identification, the **second** issue is on the trial Court's failure to comply with the provisions of section 240 (3) of the Criminal Procedure Act. The **third** complaint is that the charges against him were not proved to the required standard.

Before discussing the grounds of appeal, we shall set out the brief background of the case which led to the prosecution of the appellant. It was alleged at the trial Court that the appellant forcefully took one Prisca d/o Colman @ Mkenda (PW1) from her room to the river Sanawari area where he sodomised and raped her, on 17 March 2007, at about 1.45 a.m.

At the end of it all, the appellant, realizing that (PW1) did not know the way back home, led her to the road. On seeing passersby on the road, he took PW1 back to the river Sanawari area where he sodomised and raped her for the second time. He later led PW1 to the main road, abandoned her and fled. PW1 got back home at around 4 a.m. By then, her elder sister, Magreth Colman, PW2, had noticed the absence of PW1 and made a report to the police. Upon PW1 resurfacing at home, she was taken to the police where she was issued with PF3. At the hospital she was examined and hospitalized. Subsequently the appellant was arrested and accordingly charged.

At the hearing of the appeal, the appellant appeared in person and the respondent Republic was represented by Mr. Zakaria Elisaria, learned Senior State Attorney. The Republic did not supporte the conviction and sentence of the appellant.

The crucial issue in this appeal is whether the appellant is the one who raped and sodomised PW1. It is trite law that in a criminal case the prosecution has to prove the case beyond reasonable doubt.

We begin with the issue of identification. The learned Senior State Attorney was of the firm view that the evidence of PW1, standing alone,

without corroboration, was inadequate to establish either rape or unnatural offence or both. He stated that PW1 testified that she identified the appellant with the aid of light from the houses they passed on the way to the Sanawari river, where the incident allegedly took place. Mr. Elisaria submitted that, the evidence of PW1 on the identity of the appellant was inadequate as the law requires that such light to be established as to its type, intensity, etc. He further stated that, in her testimony, PW1, did not make any attempt to give a description of the appellant to the police.

The learned Senior State Attorney drew the Court's attention to some discrepancies in the testimonies of PW1 and PW3 on the conditions within which the identification of the appellant was made. He said that whereas PW3, Detective Cpl. Paschal, the investigator and arresting officer testified that it was night time and the area was dark such that he could not recognize the two men he had arrested in the vicinity, including the appellant. He stated that PW3 evidence was in contrast to that of PW1 that the area was well lit from moonlight and from light in the neighboring houses. In view of this Mr. Elisaria submitted that the evidence of PW1 on the visual identification of the appellant at the scene of incident was not watertight and the trial Court should not have acted upon such evidence without corroboration.

As for the conviction of the appellant for unnatural offence, the learned Senior State Attorney submitted that the particulars and the evidence tendered do not show what offence was actually committed. Similarly for the offence of rape, under section 130 (4) of the Penal Code, he submitted that the evidence of penetration was lacking.

Commenting on the evidence of identification Parade, where PW1 allegedly identified the appellant, the learned Senior State Attorney submitted that it was a useless piece of evidence because the procedure was flawed and the identification parade register was not tendered in evidence.

In conclusion, Mr. Elisaria submitted that the evidence on record was insufficient to convict. He urged us to allow the appeal.

The appellant had nothing to say after the learned Senior State Attorney supported his appeal.

This Court has on many occasions emphasized on the need to consider with great caution the evidence of visual identification. Such decisions include the celebrated landmark decision in **Waziri Amani vs Republic** [1980] TLR 250 at 252. Others are **Lusabanya Siyantemu vs Rebublic** ,[1980] TLR 275, **Said Chaly Scania vs Republic**, Criminal Appeal No. 69 of 2005 (unreported), just to name a few.

As the Court stated in similar circumstances in the case of **Said Chaly Scania vs Republic**.(supra);

> **"We think where a witness is testifying about identifying another person in unfavorable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger."**

In the case under discussion the evidence of visual identification of the appellant was indeed poor. The evidence was contradictory and with discrepancies, such as those in the evidence of PW1 and PW3. The evidence of visual identification would not pass the test laid down in the case of **Waziri Amani** (supra). We agree with Mr. Elisaria that the evidence of visual identification of the appellant at the scene was not watertight. It did not irresistibly point to him as the one who committed

Republic, Criminal Appeal No. 300 of 2009, (unreported).

Having disposed of the issue of identification the way we did, it suffices to dispose of grounds 1, 2, 3, and 5 of appeal, which we accordingly allow. Once the appellant is off the hook, ground 4 of appeal on non-compliance with section 240 (3) of the Criminal Procedure Act is rendered obsolete.

In the circumstances, we allow the appeal. Conviction is quashed and sentence is set aside. We further order the appellant to be set free forthwith unless he is held for some other lawful cause.

DATE at **ARUSHA** this 08th day of June, 2013.

E. A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

I Certify that this is a true copy of the original.

(Malewo M.A)
DEPUTY REGISTRAR
COURT OF APPEAL